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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TWAROWSKI PACIFIC et al.,

Plaintiffs and Appellants,

v.

MILLARD, HOLWEGGER, CHILD
& MARTON et al.,

Defendants and
Respondents.

B282941

(Los Angeles County
Super. Ct. No. BC586290)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Gregory Keosian, Judge. Affirmed.

Steven Zelig for Plaintiff and Appellant.

Child & Marton, Bradford T. Child for Defendants and
Respondents.

INTRODUCTION

Plaintiffs Eugene Twarowski (Twarowski) and his company, Twarowski Pacific, LLC (TP), sued defendants, attorney Bradford Child (Child) and his law firm, Child & Marton, LLP (C&M),¹ for professional negligence. Defendants represented Twarowski and TP in the underlying litigation, but withdrew as counsel due to a conflict of interest. The underlying litigation was tried in two phases; in the first phase, the trial court made findings that were largely against Twarowski and TP. Child then withdrew from the case, and the second phase of trial was conducted nine months later. According to a written ruling from the trial court, judgment was entered against Twarowski and TP because TP had defaulted and Twarowski and his new attorney did not present any evidence at the second phase of trial.²

In this professional negligence action, defendants Child and C&M moved for summary judgment based on lack of causation. They argued that judgment in the underlying litigation resulted from TP's default and Twarowski's failure to present evidence at trial, not from any actions by defendants. Plaintiffs objected to the admissibility of much of defendants' evidence, including minute orders and other evidence from the underlying litigation. The trial court, on its own motion, took judicial notice of several documents from the underlying litigation and granted defendants' motion for summary judgment.

¹ The law firm was sued under its former name, Millard, Holweger, Child & Marton.

² The judgment against Twarowski and TP in the underlying litigation was later affirmed in an unpublished decision, *Kramer v. Twarowski Pacific, LLC* (July 11, 2017, B267701 [nonpub. opn.]).

We affirm. Plaintiffs have failed to preserve many of their objections to defendants' evidence, the trial court did not abuse its discretion in taking judicial notice of the documents from the underlying litigation, and plaintiffs did not demonstrate a triable issue of fact on the element of causation.³

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint

Plaintiffs alleged that they are licensed public adjusters⁴ who provide litigation and forensic support services in relation to insurance claims involving damage to structures. Plaintiffs worked with defendants on several cases, and hired defendants as counsel when plaintiffs were sued in relation to their adjusting services.

On June 25, 2015, plaintiffs Twarowski and TP filed a complaint against defendants Child and C&M alleging breach of fiduciary duty, constructive fraud, negligence, and breach of oral and implied contract relating to defendants' representation.

³ Shortly before oral argument, plaintiffs' counsel filed a document with this court stating that TP is not in good standing with the Secretary of State. A business entity "that has had its powers suspended 'lacks legal capacity to prosecute or defend a civil action during its suspension.'" (*Tabarrejo v. Superior Court* (2014) 232 Cal.App.4th 849, 861; see also *Bourhis v. Lord* (2013) 56 Cal.4th 320, 324 [a corporation "may not . . . appeal from an adverse judgment in an action while its corporate rights are suspended for failure to pay taxes."]) Because TP lacks the legal capacity to appeal, the appeal as to TP alone is dismissed.

⁴ In a declaration Twarowski explained, "[A] licensed public adjuster is an individual knowledgeable in first party insurance issues and property damage who represents the insured against the insurance company. A public adjuster is the counterpart to the company adjuster."

Several layers of litigation underlie plaintiffs' malpractice claim against defendants; a summary is as follows.

Twarowski and TP worked with a couple, the Kramers, relating to an insurance claim and bad faith lawsuit against their insurance company, Allstate. We will refer to that litigation as "*Kramer v. Allstate*." The Kramers later sued Twarowski and TP relating to that work in a lawsuit we will call "*Kramer v. Twarowski*." Twarowski and TP also worked with an individual, Richardson, relating to an insurance claim and lawsuit against her insurance company, Fireman's Fund. We will refer to this litigation as "*Richardson v. Fireman's Fund*." Richardson later sued Twarowski and TP relating to that work in a lawsuit we will call "*Richardson v. Twarowski*." Child and C&M represented Twarowski and TP in *Kramer v. Twarowski* and *Richardson v. Twarowski*.

In the instant complaint for professional negligence against Child and C&M, Twarowski and TP alleged that the Kramers sued them in *Kramer v. Twarowski* for claims arising out of the Kramers' insurance claims and lawsuit against Allstate. Child and C&M agreed to defend Twarowski and TP in *Kramer v. Twarowski*, "and would assert appropriate causes of action on behalf of [Twarowski and TP] against the Kramers." However, while *Kramer v. Twarowski* was pending, Twarowski and TP sued Child and C&M for malpractice relating to the Richardson litigation, in a case we will refer to as the Richardson malpractice action.⁵ Plaintiffs alleged that "in retaliation" for filing the

⁵The details of the Richardson malpractice action are not relevant to the appeal, but Twarowski and TP alleged in their complaint that when *Richardson v. Twarowski* was initiated, Child and C&M "agreed to represent Plaintiffs against

Richardson malpractice action, Child and C&M “abandoned” Twarowski and TP in *Kramer v. Twarowski*, “leaving [them] without a lawyer.”

Twarowski and TP alleged that Child and C&M withdrew from *Kramer v. Twarowski* “[w]hile [it] was in trial” and “after trial had begun.” The first phase of a bifurcated trial was held in “January/February 2014,” and the second half of the trial “was set later in the year of 2014.” In July 2014, Child and C&M “abandoned Plaintiffs.” In addition, Twarowski and TP asserted that “Defendants’ handling of the matter was grossly below applicable standards.” Twarowski and TP alleged that Child and C&M “did not invest the time and money necessary in order to properly work up the claim,” and failed to plead appropriate causes of action in the cross-complaint against the Kramers. Twarowski and TP asserted that “[a]s a result of Defendants’ malfeasance relative to [*Kramer v. Twarowski*], Plaintiffs have been damaged in an amount approximating \$2.5 million dollars.”

B. Motion for Summary Judgment

On December 20, 2016, defendants filed a motion for summary judgment. They asserted primarily that defendants’ actions were not the legal cause of any damages to plaintiffs, and that the “legal cause of judgment entered against Twarowski and Twarowski Pacific” in *Kramer v. Allstate* was Twarowski’s

Richardson, even though [Child and C&M] had earlier represented Richardson” in *Richardson v. Fireman’s Fund*. Twarowski and TP alleged that “[t]he conduct of [Child and C&M] relative to the [*Richardson v. Twarowski*] action was not substantially below the standard of care [*sic*], but was also fraudulent.” Twarowski and TP “had no choice but to file a malpractice action against Defendants as a result of their mishandling of the Richardson matter.”

“decision to present no evidence” at the trial. Defendants submitted declarations by Child and attorney Vana Parker Margolese, who represented the Kramers in *Kramer v. Allstate* and *Kramer v. Twarowski*.

1. *Kramer v. Allstate*

In their motion, defendants described *Kramer v. Allstate* as follows. The case arose out of a water damage insurance claim in the Kramers’ home. In August 2009, “[t]he Kramers hired Twarowski Pacific to pursue their insurance claim” against Allstate. The Kramers signed a public adjuster’s contract stating that TP would receive as payment 15 percent of “any monies recovered from the insurance company however obtained.” The claim went through an “appraisal proceeding,” which defendants described as “essentially an insurance arbitration to determine the amount of money the insurance company owes on the claim.”

The Kramers hired Margolese to represent them against Allstate. According to Margolese’s declaration in support of the motion, although the public adjuster’s contract was already in place, plaintiffs requested that the Kramers sign a “Client Fee Agreement” stating that Twarowski is a “consultant” who would “prepare, assist, strategize, interview experts, prepare testimony and assist attorney [*sic*] during hearings.” Margolese said that after the Kramers signed the client fee agreement, Twarowski “almost immediately sent [the Kramers] an additional bill for \$13,750,” which the Kramers did not pay.

According to Margolese, Twarowski “refused to assist our office and the Kramers with the appraisal hearing. He refused to provide our office with his file materials and photographs. He refused to attend the hearing and tried to interfere with our calling contractor witnesses at the hearing.” The Kramers

“formally rescinded both the original Public Adjuster Contract and the Client [Fee] Agreement.” The appraisal panel entered an award in favor of the Kramers.

The Kramers then sued Allstate for breach of contract and bad faith in *Kramer v. Allstate*. Margolese stated that “Twarowski refused to assist in the prosecution of the lawsuit against Allstate and he continued to refuse to provide his file materials and photographs from the time that he represented the Kramers as their public adjustor.”

2. *Kramer v. Twarowski*

Defendants’ motion for summary judgment described the *Kramer v. Twarowski* litigation—the action underlying plaintiffs’ malpractice claims. On December 16, 2011, the Kramers, represented by Margolese, filed *Kramer v. Twarowski* against Twarowski and TP, alleging breach of contract and fraud, and seeking declaratory relief and rescission. Twarowski and TP, represented by Child and C&M, filed a cross-complaint for breach of contract, unjust enrichment, breach of the covenant of good faith and fair dealing, conversion, money had and received, and constructive trust. Twarowski and TP alleged that the Kramers owed them a percentage of the damages recovered from Allstate.

Kramer v. Twarowski proceeded to a multi-phase trial. With their motion for summary judgment, defendants included as an exhibit an order from the *Kramer v. Twarowski* court dated October 2, 2015 (the October 2 order). The October 2 order included a section in which the court recited “the procedural history of this case, the findings of fact and conclusions of law . . . outlined as follows.” The court stated that the matter had been called for trial on January 23, 2014, and after deciding to bifurcate certain issues, the first phase of the trial was held on

February 13, 14, 25, and 26, 2014. On February 26, 2014, the Kramers advised the trial court that according to the California Secretary of State website, TP was not in good standing and therefore had been suspended. The court set a hearing date for an order to show cause to review the status of TP. At the hearing on May 13, 2014, “the court received certified documents confirming the suspension of TP.” The court therefore ordered TP’s answer and cross-complaint stricken, and entered TP’s default on the Kramers’ complaint.

Following the first phase of the *Kramer v. Twarowski* trial, the court issued a proposed statement of decision stating its findings, which defendants included as an exhibit with their motion for summary judgment. The court discussed the scope of the parties’ claims in light of the two contracts at issue (the public adjuster contract and the client fee agreement), default as to TP on the Kramers’ complaint, and the fact that the claims of TP in the cross-complaint against the Kramers had been stricken. The court held, in essence, that neither TP nor Twarowski was entitled to recover against the Kramers. According to the October 2 order, the court then “continued trial to 7/10/14 for the jury trial portion.”⁶

In Child’s declaration in support of the motion for summary judgment, he stated that on May 27, 2014, he was served as a defendant in the Richardson malpractice action. On June 25, 2014, Child and C&M moved to withdraw from *Kramer v. Twarowski* “based on the conflict of interest created by

⁶ The record is not clear as to what issues were to be determined in the second phase of the trial, but it appeared to involve determining the Kramers’ entitlement to damages on the claims in their complaint.

Twarowski's malpractice suit." The court granted defendants' motion to withdraw as counsel on July 7, 2014, later noting in the October 2 order that the Richardson malpractice action created "an actual and direct conflict between Mr. Child and his clients."

The court also stated in its October 2 order that it "ordered E. Twarowski to be personally present for trial on 7/14/14." However, "[o]n 7/14/14, the jury trial was called. Defendants failed to appear for trial, and no counsel on their behalf appeared." The court ordered Twarowski's answer stricken for failure to appear, entered default, and set a date for a default prove-up hearing.

The court later granted the Kramers' request to vacate default, and the Kramers filed a first amended complaint and statement of damages. Twarowski and TP each filed an answer in propria persona. The court found that TP's answer was "ineffective" because it was not filed by counsel, and again entered default as to TP. On January 22, 2015, the court "held the trial, [default] prove-up hearing," and final status conference. "The court also noted that E. Twarowski failed to appear for trial."

The October 2 order further stated that on March 25, 2015, the court "proceeded to conduct a trial as to the individual defendant [Twarowski] and a default judgment hearing as to the corporate defendant, TP, with extensive evidence and testimony. The court offered an attorney who stated he was appearing for the defense an opportunity to cross-examine and participate and he declined. E. Twarowski did not cross-examine or present any witnesses or testimony on his own behalf. The court noted that E. Twarowski was present in court but left prior to Plaintiff's counsel calling him as a witness regarding his net worth. Thus,

E. Twarowski was not available when Plaintiff's counsel sought to have him testify. The court granted judgment to be entered as follows: Compensatory damages of \$576,452.95, non-economic damages of \$500,000.00, and punitive damages of \$200,000.00." TP later moved to set aside the default, and the court denied the motion in its October 2 order. The court signed the judgment against Twarowski and TP on October 2, 2015.

3. *Defendants' contentions in their motion for summary judgment*

In their motion for summary judgment, defendants asserted that "Plaintiffs have made no effort to make any causal connection between any of the alleged deficiencies in Child's representation and the decision of Mr. Twarowski and his attorney Aaron Aftergood to present no evidence at the trial, nine months after Child's withdrawal from the case." Defendants also asserted that they "were dutifully representing plaintiffs until they were compelled to withdraw." They contended that "nothing Child did or did not do caused the judgment to be entered against Twarowski." Defendants further asserted that they did not breach any duties, they were amply prepared for trial, and no meritorious claims were omitted from the cross-complaint against the Kramers.

C. Opposition

In their opposition to the motion for summary judgment, plaintiffs argued that "[t]he Court's first job is to rule on evidentiary objections." Plaintiffs did not file written objections, but stated that they would make evidentiary objections at the hearing. In their opposition, plaintiffs argued that the Margolese and Child declarations were largely inadmissible. They asserted that Margolese failed to establish that she had personal

knowledge of what occurred in *Kramer v. Allstate* or *Kramer v. Twarowski*. Plaintiffs contended that because attorney Wayne Hunkins signed several of the documents from those litigations on behalf of Margolese’s law firm representing the Kramers, “the elephant-in-the-room question is where are the declarations of Kramer and Hunkins?” Plaintiffs also asserted that because Margolese could not establish a foundation, “virtually every exhibit contained in the moving papers is inadmissible.” Plaintiffs argued that Child’s declaration “is largely inadmissible too,” because it discussed settlement negotiations in *Kramer v. Twarowski* and included inadmissible hearsay.

Plaintiffs further contended that because defendants did not seek judicial notice for the documents relating to the underlying litigations, and the motion relied in large part on those documents, “the motion must be denied.” Plaintiffs argued that although a court may take judicial notice of the existence of certain documents, it may not judicially notice the truth of the matters therein,⁷ and therefore the documents could not support granting the motion for summary judgment. Thus, Plaintiffs asserted that defendants had not met their initial burden on summary judgment.

Plaintiffs also asserted that there were triable issues of fact with respect to the standard of care. They submitted the declaration of Daniel J. Spielfogel, a litigation attorney, who opined that in *Kramer v. Twarowski* defendants “severely

⁷ As discussed more fully below, “[w]hile judicial notice may be taken of court records (Evid.Code, § 452, subdivision (d)), the truth of matters asserted in such documents is not subject to judicial notice.” (*Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 597.)

violated applicable standards of care and engaged in significant ethical violations.” Spielfogel stated that defendants should have included causes of action for fraud, negligent misrepresentation, and quantum meruit in plaintiffs’ cross-complaint against the Kramers. He also stated that defendants’ withdrawal from *Kramer v. Twarowski* “was below the standard of care, was unethical and constituted abandonment.” Spielfogel stated that although it would have been “uncomfortable” for Child and C&M to continue representing Twarowski and TP while Twarowski and TP were suing Child and C&M in the Richardson malpractice litigation, “a lack of comfort does not mean that the Child defendants were compromised in their representation” of plaintiffs in *Kramer v. Twarowski*. He also said that if defendants had not withdrawn from the case, “the confusing and convoluted series of procedural mis-steps leading to the massive default judgment could have been avoided.”

Plaintiffs also submitted a declaration from Twarowski that detailed the Richardson and Kramer litigations. Twarowski stated that in *Kramer v. Twarowski*, the Kramers were represented by attorney Wayne Hunkins with Margolese’s firm—not Margolese herself. Twarowski stated in his declaration, “I told Hunkins that I would fully cooperate with him and in fact fully cooperated with him.” Twarowski said that Hunkins terminated the consulting agreement and told Twarowski not to appear at the appraisal hearing.

Twarowski stated that he fully cooperated in the *Kramer v. Twarowski* trial before defendants withdrew. He said Child “told me that he would cease representing me unless I immediately dismissed the” Richardson malpractice action. Twarowski said he had medical problems at the time defendants withdrew, and

“attempted to engage competent counsel,” but “I estimate that I contacted over 10 lawyers without success.” In the next sentence, without discussing anything that happened in the second phase of the *Kramer v. Twarowski* trial, Twarowski stated, “On October 2, 2015, a default judgment was rendered against TP and me in an amount in excess of \$1.37 million.” Twarowski said that he and TP appealed that judgment, the appeal was pending, and plaintiffs had requested that the instant case be stayed until the appeal was decided.

Plaintiffs also submitted a declaration by Steven Zelig, plaintiffs’ counsel in this case. Zelig stated, in part, “The Child defendants never served me with a hard copy of the motion. They served me only by email.” Zelig also stated that he felt that the separate statement of undisputed material facts was inappropriate in that the facts were “not discrete or clear, and virtually every one is compound and some are excessively compound, making my job much more difficult and cumbersome.” Zelig also asked that the court “reconsider its rejection of our request for a stay. It makes no sense for anyone to try this case in a month or so while the appeal [in *Kramer v. Twarowski*] is pending.”

D. Reply

In their reply, defendants asserted that the cross-complaint in *Kramer v. Twarowski* was appropriately drafted, but even if it had not been, any alleged failings in the cross-complaint could not have been the cause of harm to plaintiffs because the cross-complaint was stricken as to TP, and Twarowski presented no evidence at trial. Defendants stated that in their opposition, plaintiffs failed to address the fact that Twarowski did not present any evidence in the *Kramer v. Twarowski* trial. They

submitted a copy of Twarowski and TP's opening brief filed in the pending appeal from the judgment in *Kramer v. Twarowski*, and asserted that the brief contained "an admission of the factual and procedural history" asserted in defendants' motion for summary judgment.

Defendants argued that plaintiffs' objections lacked merit, but to "forestall any credibility being given to these objections," defendants submitted "the Supplemental Declaration of Vana Margolese, buttressed by the declaration of her co-counsel in the Kramer case, Wayne Hunkins." In her supplemental declaration, Margolese stated that she was the trial attorney in *Kramer v. Twarowski*, and "I was present at each and every day of the trial as well as the hearing . . . referenced in my declaration." She also stated that she had personal knowledge regarding the Kramers' claim and lawsuit against Allstate, and of each exhibit submitted with her original declaration.

Hunkins stated in his declaration that he also represented the Kramers in *Kramer v. Allstate* and *Kramer v. Twarowski*. He said that he testified as a witness in *Kramer v. Twarowski* regarding the effects of Twarowski's actions on the Kramers' efforts to recover insurance benefits and damages from Allstate. Hunkins also stated that the *Kramer v. Twarowski* court's timeline in the October 2 order was accurate, and discussed his personal knowledge of what occurred at trial, namely, that Twarowski and his counsel did not present evidence or cross-examine any witnesses.

Defendants also submitted a request for judicial notice with their reply, asking the court to take judicial notice of seven documents from the court in *Kramer v. Twarowski*, including a July 18, 2014 document titled, "Findings of Fact and Conclusions

of Law,” in which the court held that Twarowski and TP were not entitled to recover under the contracts, and a certified copy of the court’s October 2 order.

Defendants also asserted that Spielfogel’s opinion regarding defendants’ withdrawal from *Kramer v. Twarowski* was not supported by any statute, case law, or ethical rule, and therefore was an improper expert opinion. Defendants also emphasized that they withdrew from *Kramer v. Twarowski* pursuant to a motion, which the court granted due to an “actual and direct conflict.”

E. Hearing

The court issued a tentative ruling granting the motion. The court noted that although plaintiffs argued about the admissibility of some of defendants’ evidence in their opposition, they had not filed written objections pursuant to California Rules of Court, rule 3.1352.⁸ The court stated that it would entertain oral objections at the hearing pursuant to that rule.

At the March 6, 2017 hearing, plaintiffs’ counsel argued that the court could not take judicial notice of documents on its own motion “without giving proper notice, which you didn’t do.” He also asserted that the court could not take judicial notice “of the factual findings” in the *Kramer v. Twarowski* court’s orders. Plaintiffs’ counsel also argued that in *Kramer v. Twarowski*, “you’re midtrial. You make a motion to withdraw on a guy who has health issues. He tries to find a lawyer. He can’t oppose the

⁸ “A party desiring to make objections to evidence in the papers on a motion for summary judgment must either: (1) Submit objections in writing under rule 3.1354; or (2) Make arrangements for a court reporter to be present at the hearing.” (Cal. Rules of Court, rule 3.1352.)

motion to withdraw because he's not a lawyer and he doesn't know how, and then the judge makes a finding that there's a conflict of interest. So . . . there's just rampant breaches of fiduciary duty here, appalling breaches of fiduciary duty." And even if there was no causation for actual damages, "you still have nominal damages under at least two causes of action, breach of fiduciary duty and breach of contract," and therefore summary judgment should be denied.

Plaintiffs' counsel asked, "Did the court consider the additional evidence and the additional data that was put in on the back end of this motion?" The court responded, "I didn't consider the additional evidence, no." Plaintiffs' counsel then objected to the declarations of Margolese and Child. Plaintiffs' counsel said that an overarching concern with Margolese's declaration was that "she says, 'We did this.' My basis [for the objection] is, how do we know what she did?" He contended that although Margolese was a partner of her firm, "we don't know simply because she's a named partner in this firm what she did." Instead, "Mr. Hunkins was the one that was largely responsible," as evidenced by his signature on moving papers and letters.

Child, representing defendants, stated that in *Kramer v. Twarowski*, "every single appearance, every single trial date Ms. Margolese was there." In addition, Hunkins and Child also submitted declarations as to what occurred at the *Kramer v. Twarowski* trial. "So we have the judge. We have the attorney. We have two attorneys on the plaintiff's side both submitting declarations, and we have the admissions of Mr. Twarowski himself in his appellate brief to the appellate court admitting that he appeared with counsel on March 25th, 2015 for the

[*Kramer v. Twarowski*] trial and declined to submit any evidence to the court.”

On the record, plaintiffs’ counsel orally objected, sentence-by-sentence, to the Child and Margolese declarations that had been submitted with the motion, and objected to multiple exhibits attached to the declarations. Plaintiffs’ counsel also objected to the “new declarations” submitted with the reply, which were “completely improper.” The court did not rule on the objections at the hearing, and took the matter under submission.

F. Ruling

The court granted the motion for summary judgment in a written ruling dated March 23, 2017. The court stated that on its own motion, it took judicial notice of exhibits submitted with the motion, including the October 2 order, which constituted “official acts” of the court, court records, and facts “not reasonably subject to dispute.” (See Evid. Code, § 452, subds. (c), (d), & (h).) The court also took judicial notice of several documents filed with defendants’ reply and request for judicial notice, including certified copies of several *Kramer v. Twarowski* court documents. The court acknowledged that it could not take judicial notice of the truth of the court’s factual findings, but it could determine that an issue had been adjudicated. The court noted that plaintiffs objected to defendants’ failure to request judicial notice with the motion, but stated, “[T]he court will not deny the entire motion for summary judgment based solely on the failure to properly request judicial notice.”

The court addressed plaintiffs’ objections to the Margolese and Child declarations. The court noted that “the majority” of plaintiffs’ objections to Margolese’s declaration were made “on the basis that she lacked personal knowledge of the general

procedural history of the underlying litigation.” The court said that it was “not relying on the Margolese declaration in its order, but rather on the judicially noticeable documents.” The court therefore did not rule on plaintiffs’ objections to the Margolese declaration. The court acknowledged that plaintiffs objected to the inclusion of information regarding settlement talks in Child’s declaration, and stated that it also was not relying on that information. The court further stated that although plaintiffs argued that the facts in the separate statement of undisputed fact filed with the motion were compound and failed to comply with court rules, “the court finds that they are sufficiently plain and concise within the meaning of” Code of Civil Procedure section 437c.

The court found that defendants met their burden to show that “the negative results in the underlying action were not caused by” defendants. “Twarowski was granted multiple continuances in the trial and was represented by counsel at trial, but failed to produce any evidence.” Defendants met their burden to show that the “failure to introduce any evidence at trial was the cause of the adverse judgment,” rather than any actions by defendants. In addition, the cross-complaint against the Kramers “was dismissed because of [TP’s] status as a suspended entity, and not any action taken or not taken” by defendants. In addition, “Spielfogel fails to provide any evidence, or even argue, as to how [defendants’] withdrawal nine months before trial caused any damage to” plaintiffs. Thus, the court held that plaintiffs had failed to present evidence of a triable issue of fact as to causation on any of the alleged causes of action, and therefore granted defendants’ motion.

The court entered judgment in favor of defendants, and plaintiffs timely appealed.

DISCUSSION

On appeal, plaintiffs assert that the trial court erred in granting summary judgment. “We review the trial court’s grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law.” (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484.)

Summary judgment is appropriate if “all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) “[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) “[O]nce a moving defendant has ‘shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,’ the burden shifts to the plaintiff to show the existence of a triable issue.” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) “There is a triable issue of material fact if . . . the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar, supra*, 25 Cal.4th at p. 850.)

“A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.” (*In re Marriage of Arceneaux*

(1990) 51 Cal.3d 1130, 1133.) “An appellant has the burden to demonstrate reversible error with reasoned argument and citation to authority.” (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066.)

Plaintiffs assert that defendants did not show a lack of a triable issue of fact, because the evidence defendants submitted was not admissible. We therefore address plaintiffs’ evidentiary arguments first.

A. Plaintiffs’ evidentiary objections

In reviewing a ruling on a motion for summary judgment, we consider “all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) Although plaintiffs made objections at the hearing, the court specifically stated in its written ruling that it did not rule on plaintiffs’ objections or rely on the evidence to which plaintiff objected. When the “trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled . . . and the objections are preserved on appeal.” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534; see also Code Civ. Proc., § 437c, subd. (q) [“Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.”].) In this situation, “there was no exercise of trial court discretion, [so] the Court of Appeal ha[s] no occasion to determine whether the trial court abused it.” (*Id.* at p. 535.) Review under these circumstances is de novo. (*Ibid.*)

However, to challenge the admissibility of evidence on appeal, there is a “burden on the objector to renew the objections in the appellate court.” (*Reid v. Google, Inc., supra*, 50 Cal.4th at p. 534.) A party’s “citation to its objection below, without

advancing any argument on the evidentiary issue in its appellate brief, is not sufficient to raise the issue on appeal.” (*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232 fn. 17.)

1. *Judicial notice of documents from Kramer v. Twarowski*

On its own motion, the trial court took judicial notice of certain documents from the *Kramer v. Twarowski* court, including the October 2 order. For the first time in their reply brief, plaintiffs assert that the court erred when it took judicial notice on its own motion. For example, plaintiffs state that they “vehemently challenge” the trial court’s “wholesale judicial notice” of the October 2 order’s statement that Twarowski and his attorney did not present evidence during the second phase of trial.

A court’s ruling on a motion for judicial notice is typically reviewed for abuse of discretion. (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520.) However, plaintiffs have forfeited this claim of error by failing to address it in their opening brief. ““Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission.”” (*Alcazar v. Los Angeles Unified School Dist.* (2018) 29 Cal.App.5th 86, 100 fn. 5.) Thus, “points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.” (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.)

Plaintiffs offer no explanation for addressing the court’s judicial notice ruling only in their reply brief.

Even if this argument had not been forfeited, it is not supported by applicable authority. Plaintiffs assert that “the trial court was not authorized under the summary judgment statute to take judicial notice on its own motion.” They point to Code of Civil Procedure section 437c, the statute governing motions for summary judgment, and state, “Nowhere in the statute is their [*sic*] any language to the effect that a judge can take judicial notice on his or her own motion.” They assert that such a procedure “would violate due process and notice-and-opportunity-to-be-heard rights of a party opposing a motion for summary judgment.” Plaintiffs cite no additional authority for these arguments.

The procedures for judicial notice are included in Evidence Code sections 450 through 459, which plaintiffs do not cite. Evidence Code section 455 states that when a court “proposes to take judicial notice” of matter described in Evidence Code section 452, “the court shall afford each party reasonable opportunity, . . . before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.”

Here, plaintiffs had ample opportunity to present information relevant to judicial notice and the matter to be noticed. Plaintiffs briefed the issue of judicial notice in the opposition to the motion for summary judgment; the tentative ruling placed plaintiffs on notice that the court was considering granting judicial notice; and judicial notice was addressed at the hearing. This was not a situation akin to that in *People v. Banda*

(2018) 26 Cal.App.5th 349, 360, for example, where the court failed to comply with Evidence Code section 455 when it “did not indicate it was taking judicial notice of the police report until after it had ruled, depriving Banda of both notice and the opportunity to object.” Here, the issue of judicial notice was central to plaintiffs’ opposition, and it was addressed in defendants’ reply, the tentative ruling, and the oral argument on the motion. Plaintiffs were not denied the opportunity to present information to the court relevant to the judicial notice finding.

Plaintiffs argue that a court may not take judicial notice of “the truth of factual findings,” but instead may only notice “the ‘existence’ of certain rulings, findings, and events.” Indeed, “[j]udicial notice is properly taken of the existence of a factual finding in another proceeding, but not of the truth of that finding.” (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120.) However, “judicial notice of findings of fact does not mean that those findings of fact are true; it means only that those findings of fact were made.” (*Id.* at pp. 120-121.) It was appropriate for the court to judicially notice that the *Kramer v. Twarowski* court made these findings and based its rulings upon these findings, and therefore the court did not abuse its discretion.

A “reviewing court shall take judicial notice of . . . each matter properly noticed by the trial court.” (Evid. Code, § 459, subd. (a).) “[N]otice by this court is therefore mandatory.” (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1.) We therefore take judicial notice of the documents the trial court judicially noticed.

2. *Margolese declaration*

Plaintiffs assert generally that much of Margolese's declaration is inadmissible, but they have only preserved a limited number of objections for review on appeal. California Rules of Court, rule 3.1352 allows objections to be made on the record at a hearing on a motion for summary judgment, and plaintiffs followed this procedure. The objections made on the record during the hearing are the only ones that have been properly preserved for appeal.

Because a primary focus of the court's decision regarding causation was Twarowski's and his counsel's decision to not cross-examine witnesses or produce evidence in the final phase of the *Kramer v. Twarowski* trial, we focus on paragraph 31 of Margolese's declaration, which discussed that aspect of the case. There, Margolese stated, "On March 25, 2015, we appeared for the trial" in *Kramer v. Twarowski*. Twarowski "was initially present for trial" with an attorney, and the court gave Twarowski and his attorney "an opportunity to cross examine or present witnesses, testimony, or documents," but they "declined to present any evidence at the trial." Margolese continued, "Accordingly, we proceeded to prove-up the Kramers' damages to Judge Hill. During a break, Mr. Twarowski and his attorney left the courtroom and didn't return. I was unable to call Eugene Twarowski to have him testify regarding his net worth for punitive damages."

At the hearing, plaintiffs objected to this paragraph because "it talks about what's set forth in the court orders," and "I don't know that Ms. Margolese was there. We have no reason in this record to conclude that she was there and she saw or heard or otherwise observed the alleged occurrences described in

those last few sentences of paragraph 31.” The court did not rule on this objection, or any other objection to the declarations.

Plaintiffs have not renewed their objection to this portion of Margolese’s declaration on appeal. In their opening brief, plaintiffs argue that the trial court “should have sustained plaintiffs’ objections” to the Margolese declaration. They point specifically to paragraphs 3-8, 11, 12, 14, 16, 17, 18, and 20 in Margolese’s declaration, and state, “The rest of Margolese’s declaration contains equally inadmissible data.” By not discussing their objections to paragraph 31 in Margolese’s declaration in their briefs on appeal, plaintiffs have forfeited any challenge to it. “Appellate briefs must provide argument and legal authority for the positions taken. ‘When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.’” (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

Even if we were to consider the objection, however, it lacks merit. At the beginning of her declaration, Margolese included standard language stating, “I have personal knowledge of the matters set forth herein and if called upon to do so, I could and would testify competently thereto.” This complies with Code of Civil Procedure section 437c, subdivision (d), which states, “Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations.” Plaintiffs objected to this language on the basis that “it’s just a conclusion.” Plaintiffs are correct that the “bald recital” of personal knowledge typical in declarations does not

necessarily “satisfy the proponent’s burden to affirmatively demonstrate that the witness is testifying from his own perception of the events he describes.” (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 692, fn. 1.) But Margolese’s declaration included additional information indicating personal knowledge of the issues in paragraph 31. She stated that the Kramers retained her firm to represent them in *Kramer v. Allstate* and *Kramer v. Twarowski*. She also stated in paragraph 31 that “we” appeared in court for the final phase of the *Kramer v. Twarowski* trial. Although the language is somewhat vague, the ambiguity is clarified later in the paragraph, where Margolese stated that after Twarowski left the court, “I was unable to call Eugene Twarowski to have him testify.” These statements allow for a reasonable inference that Margolese was personally present at the trial, and had sufficient personal knowledge to establish the facts in her declaration, and plaintiffs’ objection is overruled.⁹ In addition, the *Kramer v. Twarowski* judgment, which was attached to defendants’ motion and of which the court took judicial notice, states that Margolese appeared at the March 25, 2015 trial.

3. *Evidence submitted in reply*

Plaintiffs assert in their opening brief that the court should not have considered evidence that Child and C&M submitted with their reply. This portion of plaintiffs’ opening brief states, in its entirety, “The trial court should have disregarded all new

⁹ In her supplemental declaration filed with the reply in support of summary judgment, Margolese stated. “I was the trial attorney for the Kramers in their case against TP and Eugene Twarowski. I was present at each and every day of the trial as well as the hearing before Judge Hill referenced in my declaration.”

evidence included with the reply. CCP Section 437c does not allow new evidence at the back end of the motion. This is a due process issue.” No additional arguments are included, and there are no citations to additional authority or to the record. The reply brief includes the same contention, repeated verbatim. By failing to cite appropriate authority for this position, plaintiffs’ argument regarding new evidence submitted with defendants’ reply is forfeited.

In any event, the trial court did not consider the evidence submitted with defendants’ reply. This was within the trial court’s discretion. (See *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 432; *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362 fn. 8.)

B. The motion for summary judgment

Having rejected plaintiffs’ contentions that the evidence discussed above was inadmissible, we turn to plaintiffs’ contentions that the motion should have been denied. When challenging a judgment on appeal, the “appellant bears the burden of establishing both error and a miscarriage of justice.” (*Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1103-1104.) “[T]he appellant has the burden to . . . [present] legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited.” (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.)

1. *Defendants met their burden to show lack of a triable issue as to the element of causation.*

Plaintiffs assert that defendants failed to affirmatively show “that TP and Eugene could not win the underlying case, which is their burden in this setting.” Plaintiffs’ assertion does

not reflect the applicable summary judgment burden on a defendant in a professional negligence case.

Plaintiffs asserted four causes of action against defendants: breach of fiduciary duty, constructive fraud, negligence, and breach of contract. “Where the injury is suffered by reason of an attorney’s professional negligence, the gravamen of the claim is legal malpractice, regardless of whether it is pled in tort or contract.” (*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1022.) “In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) Thus, “[t]he plaintiff is required to prove that but for the defendant’s misconduct, “the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.”” (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 934.)

“[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial.” (*Aguilar, supra*, 25 Cal.4th at p. 851.) A defendant is not required to “to conclusively negate an element of the plaintiff’s cause of action.” (*Id.* at p. 853.) Instead, “all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action.” (*Ibid.*)

Here, defendants contended that plaintiff could not establish causation. Defendants demonstrated through Margolese's declaration and court documents that in the first phase of the *Kramer v. Twarowski* trial, conducted in January and February 2014, the court addressed issues relating to the contracts between the Kramers and Twarowski and TP. Defendants withdrew from the case in July 2014. The second phase of the trial took place in March 2015. By then, TP's answer to the first amended complaint had been stricken and default had been entered, and Twarowski did not present evidence at the second phase of trial regarding damages. Thus, defendants' evidence was sufficient to meet their burden on summary judgment to show that plaintiffs could not establish that defendants' actions caused the resulting injury, the judgment against Twarowski and TP. Defendants were not required to show that plaintiffs "could not win" the underlying case.

2. *Plaintiffs did not meet their burden to show a triable issue of material fact.*

Plaintiffs argue that even if defendants' evidence was sufficient to shift their burden on summary judgment, the motion should have been denied. Plaintiffs asserted that their claims against the Kramers had merit, as demonstrated by the trial brief Twarowski and TP submitted to the trial court after the first phase of trial. Plaintiffs point to a timeline prepared by Child discussing Twarowski's extensive work on behalf of the Kramers, and note that in Spielfogel's opinion, "if the facts included in Child's timeline were presented at trial . . . there was a substantial probability that the trier of fact would have found in favor of TP/Eugene on the complaint of the Kramers and on

TP/Eugene's cross-complaint." Even assuming these assertions are true, plaintiffs make no connection between defendants' actions and the judgment against Twarowski and TP. Plaintiffs do not state, for example, that Child failed to adequately prepare the case for trial, or that replacement counsel was unable to proceed as a result of Child's actions. Plaintiffs' claims that their contentions were meritorious is not enough to establish that defendants' actions caused a negative result in *Kramer v. Twarowski*.

Plaintiffs also assert that the motion should have been denied even if they could not prove damages, because "[n]ominal damages are available in a breach of fiduciary and breach of contract setting." Plaintiffs cite Civil Code section 3360, which states in full, "When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages." Plaintiffs also cite *Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632, which states, "A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, [citation], since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages."

"Nominal damages are properly awarded in two circumstances: (1) Where there is no loss or injury to be compensated but where the law still recognizes a technical invasion of a plaintiff's rights or a breach of a defendant's duty; and (2) although there have been, real, actual injury and damages suffered by a plaintiff, the extent of plaintiff's injury and damages cannot be determined from the evidence presented." (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 53.) Neither

circumstance is present here. If defendants' actions caused any harm, the resulting damages would have been easily measurable in the judgment entered against plaintiffs or increased attorney fees incurred. Aside from the allegation above, plaintiffs make no effort to show that the circumstances of this case warranted an award of nominal damages. Moreover, plaintiffs did not cite, and we have not found, any authority holding that a motion for summary judgment should be denied where proof of damages is lacking but nominal damages may be available.

Plaintiffs assert that defendants "barely paid lip service to the all-important issue of whether they met the standard of care." They note that Child did not discuss the standard of care in his declaration, Margolese mentioned it in her declaration "but the presentation is bizarre" (plaintiffs do not explain this statement), and "the thorough declaration of Spielfogel clearly articulates how [defendants] severely violated the standard of care." They also contend that the Spielfogel declaration "created a triable issue of fact as to whether the Child Defendants met the standard of care." They cite no legal authority regarding the standard of care in professional negligence cases.

Specifically, plaintiffs contend that defendants' failure to meet their standard of care is demonstrated by Spielfogel's opinion that defendants should have included quantum meruit and fraud causes of action in Twarowski and TP's cross-complaint against the Kramers. Plaintiffs also criticize defendants for withdrawing from *Kramer v. Twarowski*, stating that although plaintiffs "filed a lawsuit [against defendants] in a completely separate matter," this "simply created an uncomfortable situation, [that] did not justify an abandonment." Defendants respond that the *Kramer v. Twarowski* court granted the motion

to withdraw based on an “actual and direct conflict,” and that issue need not be revisited.

Ultimately, plaintiffs’ criticisms of defendants’ handling of *Kramer v. Twarowski* do not compel reversal because they have not shown a triable issue on the critical element of causation. Spielfogel asserts that quantum meruit and fraud were “very viable cause[s] of action,” and plaintiffs argue that these causes of action could have allowed Twarowski and TP to recover “under these alternative causes of action which do not rely on the existence of a public adjuster contract.” However, neither Spielfogel nor plaintiffs point to any evidence—such as the court findings from the first phase of trial, in which the court decided issues from Twarowski and TP’s cross-claims—suggesting that additional causes of action in the cross-complaint could have altered the outcome of *Kramer v. Twarowski*. (See, e.g., *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 577 [an expert’s opinion based on assumptions of fact without evidentiary support has no evidentiary value].) Moreover, given that the court struck the cross-complaint as to TP and Twarowski did not present evidence at trial, there is no evidence that the outcome would have been different had the cross-complaint included additional causes of action. Thus, plaintiffs’ bare contentions that the cross-complaint was inadequate does not present a triable issue of fact as to the element of causation.

Plaintiffs also assert that a statement of decision in an entirely separate superior court case, which involved a different public adjuster, Mr. Kapilow, “involves the exact same issue and

strongly supported” plaintiffs’ position here.¹⁰ The statement of decision, according to plaintiffs, “contains layer after layer of evidence, creating massive triable issues and completely destroying” defendants’ “bad faith arguments” that plaintiffs could not prevail against the Kramers. Plaintiffs assert that because the Kapilow public adjuster contract had “the same exact language as Twarowski’s PA contract,” the statement of decision in favor of Kapilow demonstrates that Twarowski should have prevailed here.

Referencing a superior court decision in a different litigation involving different parties does not compel a conclusion that there were triable issues of fact in this case. Trial court decisions have no precedential value. (See *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1148.) Moreover, aside from asserting that the public adjuster contracts were similar, plaintiffs make no effort to demonstrate that the Kapilow litigation was similar to this one. Plaintiffs do not assert that there is any legal basis, such as issue preclusion, that would compel the holding from the Kapilow litigation to be applied in this case. This statement of decision, therefore, does not support a finding that summary judgment should have been denied.

3. *Separate statement*

Plaintiffs further contend that the motion for summary judgment should have been denied because defendants’ statements of undisputed material facts in their separate statement “are massively compound, imposing an undue and

¹⁰ Plaintiffs submitted this statement of decision with their opposition to the motion for summary judgment and requested that the court take judicial notice of it. The court did not grant the request or address the statement of decision in its ruling.

inappropriate burden on Plaintiffs.” Code of Civil Procedure, section 437c, subdivision (b)(1) requires a motion for summary judgment to be supported by “a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence.” A separate statement of undisputed material facts must include “[e]ach supporting material fact claimed to be without dispute with respect to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion.” (California Rules of Court, rule 3.1350(d)(1)(B).) Failure to comply with the applicable requirements for a separate statement “may in the court’s discretion constitute a sufficient ground for denying the motion.” (Code Civ. Proc., § 437c, subd. (b)(1).)

The trial court considered plaintiffs’ objection on this basis, and rejected it. The court stated, “[W]hile some of the material facts in the Separate Statement include multiple sentences, the court finds that they are sufficiently plain and concise within the meaning of section 437c.” Plaintiffs do not address the trial court’s finding in either their opening brief or reply brief. Plaintiffs have not demonstrated that the court abused its discretion by declining to deny the motion on this basis.

In sum, defendants’ motion and the evidence submitted with it was sufficient to establish that plaintiffs could not prove the essential element of causation. Plaintiffs’ objections and evidence were insufficient to show a triable issue of material fact. Summary judgment was therefore appropriate.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.